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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

6 | GERARD CHANG,

No. C 07-2437 CW

Plaintiff,

8 | v.

ORDER DENYING APPLICATION
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
COMPLAINT

9 GREATER BAY BANK, GREATER BAY
BANCORP, CHERYL E. HOWELL, KRYSTYNA
10 MARCINIAK, CATHLEEN COLGAN, ERIC
LEE and DOES 1 to 50,

Defendants.

12 || _____ /

Plaintiff Gerard Chang requests leave to proceed in forma pauperis (IFP) pursuant to 28 U.S.C. § 1915(a). The Ninth Circuit has indicated that leave to proceed IFP pursuant to 28 U.S.C. § 1915(a) is properly granted only when the plaintiff has demonstrated poverty and has presented a claim that is not factually or legally frivolous within the definition of § 1915(e)(2)(B).¹ O'Loughlin v. Doe, 920 F.2d 614, 616 (9th Cir.

¹Section 1915(e)(2)(B) states:

24 . . . the court shall dismiss the case at any time if the
court determines that--

1 1990); Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1370
2 (9th Cir. 1987). Thus, the court "may deny leave to proceed in
3 forma pauperis at the outset if it appears from the face of the
4 proposed complaint that the action is frivolous or without merit."
5 Id. (quoting Reece v. Washington, 310 F.2d 139, 140 (9th Cir.
6 1962); Smart v. Heinze, 347 F.2d 114, 116 (9th Cir.), cert. denied,
7 382 U.S. 896 (1965)). An in forma pauperis complaint is frivolous
8 if it has "no arguable basis in fact or law." O'Loughlin, 920 F.2d
9 at 617; Tripati, 821 F.2d at 1379; Franklin v. Murphy, 745 F.2d
10 1221, 1228 (9th Cir. 1984).

11 The Supreme Court holds that dismissal prior to service under
12 28 U.S.C. § 1915(e)(2)(B) is appropriate where no legal interest is
13 implicated, i.e., the claim is premised on a meritless legal
14 theory, or clearly lacking any factual basis. Neitzke v. Williams,
15 490 U.S. 319, 324 (1989). Section 1915(e)(2)(B) accords judges the
16 unusual power to pierce the veil of the complaint's factual
17 allegations and dismiss those claims whose factual contentions are
18 clearly baseless. Denton v. Hernandez, 504 U.S. 25, 34 (1992).
19 Because a dismissal pursuant to § 1915(e)(2)(B) is not a dismissal
20 on the merits, but rather an exercise of the court's discretion
21 under the in forma pauperis statute, the dismissal does not
22 prejudice the filing of a paid complaint making the same
23 allegations. Id.

24 In his complaint, Plaintiff alleges the following. As of
25 April 16, 2001, Plaintiff was hired by Defendant Greater Bay Bank
26 (GBB) as a Vice President and Trust Officer of its trust company,
27 Greater Bay Trust Company (GBTC). Plaintiff was offered a base
28

1 salary of \$85,000.00 plus a twenty percent bonus and stock options.
2 Plaintiff's previous experience is in the administration of
3 employee benefits retirement plans. GBB hired Plaintiff to be a
4 trust account administrator of employee benefits plans and some
5 individual retirement accounts. All the named individual
6 Defendants are employees of GBB and GBTC.

7 Defendant Cheryl E. Howell, an Executive Vice President and
8 Compliance Officer of GBTC, assigned to Plaintiff a large number of
9 personal trust accounts, and charitable and non-profit accounts.
10 These types of accounts are ordinarily handled by a personal trust
11 administrator who typically has several years of relevant work
12 experience and often has a law degree. Plaintiff did not have the
13 relevant work experience nor a law degree when he was assigned
14 these accounts.

15 On January 26, 2005, Plaintiff resigned from his job on the
16 ground that he could not perform work that he was unqualified to
17 do. Defendants wrongfully retaliated against Plaintiff by denying
18 him the right to collect unemployment insurance benefits.
19 Defendants also "robbed" Plaintiff of his bonus payment and stock
20 options to which he was entitled. Defendants wrongfully did not
21 take any action to allow Plaintiff to return to work.

22 On December 13, 2005, Plaintiff filed a federal complaint
23 titled Chang v. Greater Bancorp, Howell, Marciak, Colman, Lee and
24 Does 1 to 50, Case No. C 05-5166 CW (2005 complaint). On May 12,
25 2006, the Court entered an order dismissing many of the causes of
26 action in the First Complaint. On March 19, 2007, the Court
27 entered an order granting summary judgment to Defendants on the

1 remaining causes of action and judgment was entered against
2 Plaintiff. On April 13, 2007, Plaintiff filed a notice of appeal.
3 This appeal is still pending in the Ninth Circuit. On May 10,
4 2007, Plaintiff moved to relate the two cases and, on May 17, 2007,
5 the Court entered an order relating them.

6 In December, 2006, during the pendency of the appeal of the
7 judgment on the 2005 complaint, Plaintiff's doctor diagnosed him
8 with bipolar disorder. Plaintiff communicated this fact to
9 Defendants' attorneys. On May 1, 2007, Plaintiff filed a
10 discrimination charge under the Americans with Disabilities Act
11 (ADA) with the Equal Employment Opportunity Commission (EEOC). The
12 EEOC informed Plaintiff that the charge was untimely and that it
13 would take no action on it. Plaintiff informed Defendants'
14 attorneys that he intended to file a discrimination action in
15 federal court. Defendants' attorneys told Plaintiff that they
16 would seek to have his complaint dismissed based on untimeliness.
17 Plaintiff alleges that this claim cannot be dismissed because
18 Defendants had knowledge of Plaintiff's mental breakdown and mental
19 disability and Plaintiff suffered the mental breakdown as a result
20 of the hostile working conditions willfully created by Defendants.

21 Plaintiff was a plaintiff or defendant in several state court
22 cases involving individuals who are not parties to this lawsuit.
23 Two state court judgments have been entered against Plaintiff.

24 Based on these allegations, Plaintiff asserts the following
25 causes of action: (1) violation of the ADA for wrongful
26 termination; (2) age discrimination based on wrongful termination;
27 (3) violation of the Fair Labor Standards Act because Defendants

1 demanded that Plaintiff perform work he was unqualified to do;
2 (4) violation of the Fair Labor Standards Act based on the hostile
3 work environment created by Defendants; (5) violation of the Fair
4 Labor Standards Act based on non-payment of earnings; (6) violation
5 of civil rights based on wrongful termination; (7) violation of
6 civil rights based on Defendants' wrongfully withholding disability
7 benefits from Plaintiff; (8) violation of civil rights based upon
8 Defendants' denying health benefits to Plaintiff; (9) violation of
9 civil rights based upon Defendants' actions toward Plaintiff
10 arising out of his mental breakdown; (10) violation of civil rights
11 based upon constructive termination; (11) violation of civil rights
12 based upon constructive termination²; (12) fraud; (13) extortion,
13 coercion and duress; (14) negligence; (15) intentional infliction
14 of emotional distress; (16) negligent infliction of emotional
15 distress; (17) tortious interference with Plaintiff's life and
16 finances; and (18) negligent interference with Plaintiff's life and
17 finances. Based upon these causes of action Plaintiff requests
18 compensatory damages based on his loss of compensation, general
19 damages for emotional distress and mental anguish and punitive
20 damages in the amount of \$10,000,000.

21 In its order granting Defendants' motion to dismiss in the
22 2005 case, the Court summarized Plaintiff's allegations as follows:

23 On April 16, 2001, Plaintiff was hired by Defendant
24 Greater Bay Bancorp (GBB) as a Vice President and Trust
Officer of its Trust Company, Greater Bay Trust Company
(GBTC). Plaintiff was offered a base salary of
25 \$85,000.00 plus a twenty percent bonus and stock options.

26
27 ²The eleventh cause of action appears to be a duplicate of the
tenth cause of action.

1 Defendant GBB hired Plaintiff to be the trust account
2 administrator of its employee benefits plans and of some
3 individual retirement accounts. Plaintiff's professional
4 experience is in the administration of employee benefit
5 retirement plans.

6 In connection with 31 U.S.C. § 5318 (the Patriot Act),
7 GBB and GBTC had to implement and comply with certain
8 stringent procedures. When Defendant Cathleen Colgan,
9 Vice President and Senior Trust Officer responsible for
10 the administration of Personal Trust accounts, resigned
11 from her job, Defendant Cheryl Howell, Executive Vice
12 President of GBB and head of GBTC, assigned Defendant
13 Colgan's trust accounts, charitable accounts and non-
14 profit accounts to Plaintiff. Under Patriot Act
15 regulations, Defendant Howell should have transferred
16 those accounts to people with relevant experience.
17 Plaintiff did not have the experience to administer such
18 accounts, and Defendant Howell failed to provide to
19 Plaintiff any program or tools to handle those accounts.
20 Defendant Eric Lee, Trust Administrative Assistant at
21 GBTC, failed to support Plaintiff in the administration
22 of client accounts as his job required. Defendant
23 Krystyna Marciniak, Vice President of Operations and
24 Compliance Officer of GBTC, failed to act in her capacity
25 as Compliance Officer to prevent this non-compliance with
 regulations and sound business principles.

26 On January 26, 2005, Plaintiff resigned from his job with
27 GBTC on grounds that he was being asked to perform acts
28 that contravene banking regulations and the Patriot Act.
29 Defendant GBB later refused Plaintiff's claims
30 for unemployment insurance benefits, and also refused to
31 pay Plaintiff's bonus. Plaintiff filed complaints with
32 the California Unemployment Insurance Appeals Board and
33 the California Labor Commissioner. Both agencies denied
34 Plaintiff's claims.

35 Based on these allegations, Plaintiff asserts sixteen
36 causes of action alleging breach of fiduciary duty,
37 violation of the Patriot Act, violation of fair labor
38 standards, and violation of civil rights. The first
39 eight counts claim that Defendants breached their
40 fiduciary duty under 12 U.S.C. § 92(a), in their
41 assignment of accounts to Plaintiff without properly
42 training him to handle the accounts. Counts nine and ten
43 claim that Defendant Howell failed to comply with the
44 Patriot Act by assigning Plaintiff to accounts he did not
45 know how to manage

46 Plaintiff seeks an injunction barring GBB from engaging
47 in actions that contravene the laws of the United States
48 and the public interest, reinstatement to his position

with seniority and benefits commensurate with his experience, lost wages, punitive damages, legal fees, and other relief the Court deems proper.

Order Granting Motion to Dismiss in First Complaint (Doc. # 31).

Therefore, except for the allegation that Plaintiff suffered from bipolar disorder, the 2005 complaint and the instant complaint contain the same allegations against the same Defendants.

DISCUSSION

I. Doctrine of Res Judicata

A. Legal Standard

10 Res judicata, or claim preclusion, prohibits the re-litigation
11 of any claims that were raised or could have been raised in a prior
12 action. Western Radio Servs. Co., Inc. v. Glickman, 123 F.3d 1189,
13 1192 (9th Cir. 1997) (citing Federated Dep't Stores, Inc. v.
14 Moitie, 452 U.S. 394, 398 (1981)). The purpose of the doctrine is
15 to "relieve parties of the cost and vexation of multiple law suits,
16 conserve judicial resources, and, by preventing inconsistent
17 decisions, encourage reliance on adjudication." Marin v. HEW,
18 Health Care Financing Agency, 769 F.2d 590, 594 (9th Cir. 1985)
19 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Res judicata
20 operates where there is "1) an identity of claims, 2) a final
21 judgment on the merits, and 3) identity or privity between
22 parties." Western Radio, 123 F.3d at 1192 (citing Blonder-Tonque
23 Lab. v. University of Ill. Found., 402 U.S. 313, 323-324 (1971)).
24 The federal rule on the preclusive effect of a judgment from which
25 an appeal has been taken is that the pendency of an appeal does not
26 suspend the effect of a final judgment for res judicata purposes.
27 Eichman v. Fotomat Corp., 759 F.2d 1434, 1439 (9th Cir. 1985).

1 superseded on other grounds, 880 F.2d 149 (9th Cir. 1989).

2 Two claims or causes of action are the same, for purposes of
3 the first prong of the res judicata test, if they arise from the
4 same transaction or series of transactions. Two events are part of
5 the same transaction or series of transactions where the claims
6 share a factual foundation such that they could have been tried
7 together. Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir.
8 1992). "Different theories supporting the same claim for relief
9 must be brought in the initial action." Id. Likewise, all
10 evidence pertinent to a particular claim must be raised in the
11 initial action because "when a court of competent jurisdiction has
12 entered a final judgment on the merits of a cause of action, the
13 parties to the suit and their privies are thereafter bound not only
14 as to every matter which was offered and received to sustain or
15 defeat the claim or demand, but as to any other admissible matter
16 which might have been offered for that purpose." Commissioner of
17 Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948) (internal
18 quotation marks omitted).

19 B. Application

20 A review of the allegations in the 2005 complaint and the
21 instant complaint reveals that, except for the allegations that
22 Plaintiff suffers from a bipolar disorder, the two complaints have
23 identical allegations against Defendants.

24 Here, the first two prongs for the application of res judicata
25 are easily met because there was a judgment on the merits in the
26 2005 complaint and the parties are the same in both actions.
27 Plaintiff argues that the causes of action in the two complaints

1 are different. However, the causes of action in both complaints
2 arise from the same transactions or series of transactions. As
3 stated above, two events are part of the same transaction or series
4 of transactions where the claims share a factual foundation such
5 that they could have been tried together. Therefore, all
6 Plaintiff's causes of action are dismissed based upon the
7 application of the doctrine of res judicata. This is true of the
8 disability claims based on Plaintiff's bi-polar disorder even
9 though Plaintiff alleges that he was not aware of his mental
10 disorder until December, 2006 and he allegedly did not know about
11 it when he filed his complaint. Plaintiff alleges that Defendants
12 knew about his mental disorder when he resigned and that, in
13 February, 2005, he was involuntarily placed in a hospital for two
14 days. Because the 2005 complaint was filed in December, 2005,
15 after he was hospitalized, Plaintiff should have known, just as he
16 alleges Defendants did, that he was suffering from a mental
17 disorder.

18 Even if the doctrine of res judicata did not apply to
19 Plaintiff's claims based on mental disability, they are deficient
20 for additional reasons, discussed below.

21 II. Claims Based Upon Bi-Polar Disorder

22 In the instant complaint, Plaintiff alleges that he was not
23 diagnosed with bipolar disorder until December 11, 2006 (Comp. at
24 ¶ 40) but that Defendants knew that Plaintiff resigned on January
25 26, 2005 due to a mental breakdown because he resigned due to
26 unusual circumstances "that any reasonable person would consider to
27 be due to a mental breakdown." (Comp. at ¶ 59). Plaintiff brings
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1 two claims premised on the theory that Defendants discriminated
2 against him on the basis of his bipolar disorder: the first cause
3 of action based upon wrongful termination in violation of the ADA
4 and the sixth cause of action based upon wrongful termination in
5 violation of Plaintiff's civil rights.

A. ADA Claim

7 Title I of the ADA prohibits a "covered entity" from
8 discriminating against a "qualified individual with a disability"
9 on the basis of that individual's disability. 42 U.S.C.
10 § 12112(a). To establish that an employment termination
11 constituted discrimination under Title I, a plaintiff must prove
12 that (1) he or she is disabled; (2) he or she is qualified to
13 perform the essential functions of the job, either with or without
14 accommodation; and (3) he or she was terminated because of his or
15 her disability. Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d
16 1080, 1095-96 (9th Cir. 2001).

17 Plaintiff's allegations giving rise to his ADA claim based on
18 his termination has several deficiencies. First, Plaintiff alleges
19 that he was not diagnosed with a mental illness until almost two
20 years after his resignation. Yet, he alleges that Defendants knew
21 he had a mental illness. He does not explain how Defendants could
22 have known of his diagnosis many months before his own doctor
23 diagnosed him. If Defendants did not know of Plaintiff's mental
24 illness, they could not have terminated him or taken any other
25 adverse employment action against Plaintiff because of his
26 disability.

27 Second, Plaintiff alleges that, although he filed a disability

1 discrimination charge with the EEOC, this agency took no action on
2 the charge because it was untimely filed. To bring a claim under
3 Title I of the ADA, a plaintiff must exhaust administrative
4 remedies by filing a formal complaint with the EEOC and filing suit
5 within ninety days of receipt of a right-to-sue letter. Santa
6 Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000).

7 Substantial compliance with this requirement is a jurisdictional
8 prerequisite. Sommatino v. United States, 255 F.3d 704, 708 (9th
9 Cir. 2001). Therefore, it does not appear that this claim is
10 exhausted and thus, this Court does not have jurisdiction over it.

11 Furthermore, under the ADA, there is a 180-day period for an
12 aggrieved party to file a charge with the EEOC. 42 U.S.C.
13 § 12117.³ Because Plaintiff resigned on January 26, 2005 and filed
14 his ADA charge with the EEOC on May 1, 2007, his charge was
15 untimely. However, because this filing period is treated as a
16 statute of limitations, the same defenses that are available to a
17 statute of limitation violation, including equitable tolling, are
18 available when the claimant fails to file a timely charge with the
19 EEOC. Santa Maria, 202 F.3d at 1176. "[E]quitable tolling focuses
20 on the plaintiff's excusable ignorance of the limitations period
21 and on lack of prejudice to the defendant." Id. Plaintiff's
22 complaint is deficient because he has not alleged any facts which
23 would support equitable tolling of his ADA claim.

24 This claim is dismissed with leave to amend for Plaintiff to
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26 ³If the complainant initially institutes proceedings with a
27 state or local agency, the EEOC charge must be filed within 300
days. Santa Maria, 202 F.3d at 1176.

1 correct the noted deficiencies, including the application of res
2 judicata, if he truthfully can do so.

3 B. Civil Rights Claim Based on Disability Discrimination

4 Plaintiff generally alleges that his civil rights have been
5 violated by Defendants' discrimination against him based on his
6 disability; he does not specify which constitutional right or
7 rights has been violated. Plaintiff must bring a claim for any
8 constitutional violation under 42 U.S.C. § 1983.

9 Title 42 U.S.C. § 1983 "provides a cause of action for the
10 'deprivation of any rights, privileges, or immunities secured by
11 the Constitution and laws' of the United States." Wilder v.
12 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
13 § 1983). Section 1983 is not itself a source of substantive
14 rights, but merely provides a method for vindicating federal rights
15 elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94
16 (1989). To state a claim under section 1983, a plaintiff must
17 allege two essential elements: (1) that a right secured by the
18 Constitution or laws of the United States was violated and (2) that
19 the alleged violation was committed by a person acting under the
20 color of state law. West v. Atkins, 487 U.S. 42, 48 (1988);
21 Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir. 1987).

22 Because it appears from the complaint that all Defendants are
23 private actors who did not commit the alleged wrongful acts under
24 color of state law, Plaintiff may not bring against these
25 Defendants any claim that they violated his constitutional rights.
26 Plaintiff also does not specify which of his civil rights have been
27 violated by which Defendant. In order to put Defendants on notice

1 of the causes of action against them, he must specify this
2 information. Therefore, Plaintiff's claim for violation of his
3 civil rights based upon his disability must be dismissed for these
4 reasons as well. If Plaintiff can add truthful allegations that
5 remedy these deficiencies, including the application of res
6 judicata, he has leave to amend this cause of action.

7 III. Application to Proceed IFP

8 Plaintiff's application to proceed IFP is deficient. On his
9 application, he indicates he is not employed and that he has no
10 income. He also indicates that he owns a home with an estimated
11 market value of over \$1,000,000 and which has a monthly mortgage of
12 \$4,459.78. He has assets of one bank account with a balance of
13 \$2,200 and stocks with a value of \$400. His monthly expenses are
14 \$700 for rent and \$250 for food. He has two money judgments
15 against him in the amounts of \$119,874 and \$40,831.

16 Plaintiff does not adequately explain how he can pay his
17 mortgage and monthly expenses if he is not employed and has no
18 other source of income. Furthermore, Plaintiff does not provide
19 adequate reasons for not being able to pay the filing fee when he
20 has assets in the form of equity in his home and cash in his bank
21 account.

22 Therefore, Plaintiff's application to proceed in forma
23 pauperis is DENIED. If Plaintiff wishes to file an amended
24 complaint, he must pay the full filing fee.

25 CONCLUSION

26 For the reasons noted above, Plaintiff's causes of action are
27 dismissed on the ground of res judicata. Plaintiff's two causes of
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1 action based on his disability are dismissed for other reasons as
2 well. If Plaintiff chooses to file an amended complaint, he must
3 do so within thirty days of the date of this order. If Plaintiff
4 does not file an amended complaint within this time period, his
5 complaint will be dismissed for failure to prosecute. If Plaintiff
6 files an amended complaint, he must pay the full filing fee.

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8 IT IS SO ORDERED.

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10 Dated: 6/7/07

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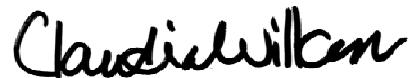
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CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CHANG et al,

Plaintiff,

Case Number: CV07-02437 CW

GREATER BAY BANK et al,

Defendant.

CERTIFICATE OF SERVICE

V.

GREATER BAY BANK et al.

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on June 7, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
office.

15 Gerard Chang
1247 Vicente Street
16 San Francisco, CA 94116

17 | Dated: June 7, 2007

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk